

Docket: 2007-2784(CPP)

BETWEEN:

NEW AGE TRANSPORT INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
New Age Transport Inc. (2007-2832 (EI)) on February 29, 2008,
at Saskatoon, Saskatchewan

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the Appellant: Allan Gustafson

Counsel for the Respondent: Brooke Sittler

JUDGMENT

The appeal under the *Canada Pension Plan* is allowed and the assessment of the Minister of National Revenue is vacated.

Signed at Ottawa, Canada, this 10th day of March 2008.

"Patrick Boyle"

Boyle, J.

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Appeal heard on common evidence with the appeal of
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Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the Appellant: Allan Gustafson

Counsel for the Respondent: Brooke Sittler

JUDGMENT

The appeal under the *Employment Insurance Act* is allowed and the decision of the Minister of National Revenue is referred back to the Minister for reconsideration and reassessment on the basis that Mr. Gustafson was not in insurable employment.

Signed at Ottawa, Canada, this 10th day of March 2008.

"Patrick Boyle"

Boyle, J.

Citation: 2008TCC146
Date: 20080310
Dockets: 2007-2784(CPP),
2007-2832(EI)

BETWEEN:

NEW AGE TRANSPORT INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Boyle, J.

[1] The Appellant, New Age Transport Inc., has appealed assessments under the *Employment Insurance Act* and the *Canada Pension Plan* for 2004 and 2005. The EI assessment is in respect of New Age Transport's employment of Mr. Gustafson. The EI assessment did not extend to Mr. Vail because the Canada Revenue Agency (CRA) understood that Mr. Vail owned all of the shares of New Age Transport at the relevant times and his employment was therefore excluded employment under paragraph 5(2)(b) of the *EI Act*. The CPP assessments are in respect of New Age Transport's employment of both Mr. Gustafson and Mr. Vail. I understand the CPP assessments are in respect of the employer's CPP contribution as well as its failure to withhold and remit the employees' contributions.

[2] At the close of the evidence, the Crown conceded that Mr. Gustafson's employment was excluded from the definition of insurable employment by virtue of the exception set out in paragraph 5(2)(i) of the *EI Act* for employees who do not deal at arm's length with their employer. Thus, only the CPP assessments of New Age Transport remained in dispute in this proceeding.

[3] The issues raised by the Appellant's evidence with respect to the CPP assessments are:

- 1) Were Mr. Gustafson and Mr. Vail employees of New Age Transport or were they independent contractors?
- 2) If they were employees, were the amounts paid to them by New Age Transport to be treated in whole or in part as travel allowances or reimbursements of travel expenses that reduced the amount of contributory salary and wages?

Employees or independent contractors

Subsection 6(1) of the *CPP* provides that pensionable employment is any employment in Canada, subject to certain exceptions that are not relevant in this case. Subsection 12(1) of the *CPP* provides that contributory salary and wages is, generally, the income from the pensionable employment computed in accordance with the *Income Tax Act*.

[4] In cases involving the differing tax, EI and CPP treatment of employees and independent contractors, it is helpful to know that employment is often referred to as a "contract of service" whereas an independent contractor enters into a "contract for services".

[5] The issue of employee versus independent contractor for purposes of the definition of pensionable employment is to be resolved by determining whether the individual, in this case each of Mr. Gustafson and Mr. Vail, is truly operating a business on his own account. This is the question set out by the British courts in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), approved by the Federal Court of Appeal in *Wiebe Door Services Ltd. v. The Minister of National Revenue*, 87 DTC 5025 for purposes of the Canadian definitions of insurable employment and pensionable employment, and adopted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983. This question is to be decided having regard to all of the relevant circumstances and having regard to a number of criteria or useful guidelines including: 1) the intent of the parties; 2) control over the work; 3) ownership of tools; 4) chance of profit/risk of loss; and 5) what has been referred to as the business integration, association or entrepreneur criteria.

[6] The decision of the Federal Court of Appeal in *Royal Winnipeg Ballet v. The Minister of National Revenue*, 2006 DTC 6323 highlights the particular importance

of the parties' intentions and the control criterion in these determinations. This is consistent with the Federal Court of Appeal's later decision in *Combined Insurance Co. of America v. Canada (Minister of National Revenue)*, 2007 FCA 60 as well as its decision in *City Water International Inc. v. Canada (Minister of National Revenue)*, 2006 FCA 350. The Reasons of this Court in *Vida Wellness Corp. v. Canada (The Minister of National Revenue)*, 2006 TCC 534 also provide a helpful summary of the significance of the *Royal Winnipeg Ballet* decision. More recently, the Chief Justice's Reasons in *Lang v. Canada (The Minister of National Revenue)*, 2007 TCC 547 are also very helpful on this point.

[7] The Appellant's Notice of Appeal does not refer to Mr. Vail or Mr. Gustafson as employees, nor does it refer to New Age Transport as an employer. The assumptions set out in the Crown's Reply do not assume that Mr. Vail and Mr. Gustafson were employed by New Age Transport, nor did they make any assumptions relating to any of the employment versus independent contractor criteria or guidelines enumerated above. Thus, CRA's CPP assessment is not to be presumed correct in this respect. The Appellant only has the traditional civil burden of proof to satisfy the Court, on a balance of probabilities, that its evidence (since the Crown did not call any evidence), as tested in cross-examination, is more consistent with the working relationships being those of independent contractors than of employment.

[8] New Age Transport was incorporated by Mr. Gustafson in 2002. At that time, he was its sole shareholder. New Age Transport was in the long distance trucking business. Mr. Vail and Mr. Gustafson were the only people who worked for New Age Transport. Mr. Vail worked for New Age Transport and part of his consideration for that work was to be an earned 50% interest in the company. As things turned out, they never became 50/50 shareholders. Mr. Gustafson remained the sole shareholder until October 2004. After that time, Mr. Vail became the sole shareholder. This apparently had something to do with Mr. Gustafson's financial difficulties and ultimate bankruptcy. Mr. Vail remained the sole shareholder until the company or its business was wound up in 2005. In 2006 the corporation was struck off the provincial corporate registry.

[9] Each of Mr. Vail and Mr. Gustafson gave evidence. Mr. Vail's evidence was clear and consistent, even through cross-examination, that they were not employees at any time. He was unwavering on this point. Mr. Vail had been excluded when Mr. Gustafson had earlier given his testimony.

[10] Mr. Gustafson on the other hand conceded in his testimony that they were technically employees only because he understood that anyone who did work for a company was an employee. He qualified his testimony and answers this way on more than one occasion. Mr. Gustafson was mistaken in his understanding of the technicalities of employment and tax law.

[11] The Crown put in evidence CRA Forms TD4 signed by Mr. Gustafson, Mr. Vail and New Age Transport certifying that in 2004 and 2005, they were employees who worked at a remote or a special work site for purposes of subsection 6(6) of the *Income Tax Act*. Mr. Gustafson explained that they understood from their discussions with CRA at the outset that these were the forms they needed to use to claim the amounts paid to them as non-taxable allowances for meals and lodging while they were on the road. In this respect, they were also mistaken as their long distance trucking activities could not constitute employment at a remote or special work site under the relevant provision, even if they were employees.

[12] Both witnesses testified that they were responsible for paying for their meals, lodging and showers while on the road as well as some vehicle maintenance.

[13] There was very little factual evidence tendered on the *Wiebe Door* criteria or guidelines described above for determinations of employment versus independent contractor. There was virtually no cross-examination of any facts relating to those criteria or guidelines.

[14] Given the scant evidence on this issue, which is key to the determination of whether the CPP assessment against New Age Transport is correct, this is not a case in which I can come to a comfortable conclusion with a normal degree of certainty that Mr. Vail and Mr. Gustafson are or are not New Age Transport's employees. However, in light of my comments above regarding the burden of proof on the Appellant being on a balance of probabilities, I can conclude that the evidence made out a *prima facie* case that the working relationships were those of independent contractors and not employment, and that this was not successfully challenged in cross-examination, either directly or indirectly, by reference to *Wiebe Door* considerations or otherwise.

[15] Most importantly, Mr. Vail said categorically on more than one occasion that they were not employees and rejected each suggestion to the contrary.

[16] I do not find Mr. Gustafson's qualified answer helpful since he was clearly in error on whether an individual can work for a corporation as an independent contractor.

[17] Similarly, I do not find the irrelevant remote work site forms very helpful and certainly not persuasive. While the fact that Mr. Vail and Mr. Gustafson signed those forms raised other questions in my mind, I do not regard them as evidence of the parties' intentions with respect to their working relationship. They either are or not employees. What one is willing to tick off and certify on a form does not determine the issue of employment versus independent contractor any more than does a heading at the top of a contract. Such determination can only be made by reference to the actual working relationship and the intentions of the parties.

[18] I conclude that the intentions of Mr. Gustafson and Mr. Vail, as well as that of the corporation of which they were the sole shareholders, was not to create an employment relationship. This was evidenced by Mr. Vail's insistence that at no time were they to be employees.

[19] Of course, intention alone cannot determine the issue. Another important consideration is that of direction and control over the work to be done. In these particular circumstances, since Mr. Gustafson and Mr. Vail were the only people able to be in charge, they must have been in charge of themselves. It cannot be otherwise. There was no one else able to exert any direction or control over them. Also, neither of them was in charge of the other since they were clear that they operated the business as equal partners throughout. While small business owners can be employees of their company, as a practical matter it would be difficult to conclude the employment relationship is evidenced by the company's control over its owners. In this case, the direction and control consideration also supports the Appellant's independent contractor relationship with Mr. Vail and Mr. Gustafson.

[20] The Crown argued that, since there was a corporation for whom they worked, Mr. Vail and Mr. Gustafson must have been employees and that they could not be self-employed in the sense of working for themselves since they clearly worked for the corporation. Unfortunately, the term "self-employed" can be a most confusing term. Fortunately, the legislation does not use it. Self-employed is often used to describe a person who operates his or her own business as a sole proprietorship. Of course, in such a case the so-called self-employment cannot in law be employment since there is only one party. However, the term "self-employment" is also often used by people who operate their small or one-person business through a corporation. They may refer to themselves as self-employed, and often without regard to whether

they are employed by, or an independent contractor of, their company. For this reason, the term “self-employed” can often be confusing or misleading. It may have been the cause of Mr. Gustafson’s misunderstanding about the technicalities of the law. Similarly, it may have contributed to this part of the Crown’s argument. In any event, it is simply not correct to say that because Mr. Gustafson and Mr. Vail worked for a corporation, their relationship must *ipso facto* be one of employment.

[21] There was little, if any, helpful evidence either way on the chance of profit/risk of loss consideration, or the ownership of tools test. However, given the particular importance of the intention of the parties and of the direction and control test in the reasons of the Federal Court of Appeal in *Royal Winnipeg Ballet*, an overall consideration of the evidence satisfies me on a balance of probabilities that the working relationships were those of independent contractors and not employees.

Travel allowances

[22] Since Mr. Gustafson and Mr. Vail were not employees of New Age Transport, the CPP appeal of New Age Transport will be allowed. As set out above, the Crown conceded that New Age Transport’s EI appeal should be allowed. I therefore do not need to decide the second issue of whether the amounts paid to Mr. Gustafson and Mr. Vail were reasonable travel allowances or travel expense reimbursements that reduce income for tax purposes and therefore reduce contributory salary and wages for CPP purposes.

[23] However, from the evidence and the pleadings, I understand that there are, or may soon be, related issues arising with New Age Transport, Mr. Gustafson or Mr. Vail under the *Income Tax Act* and for Mr. Gustafson and Mr. Vail under the *Canada Pension Plan*. I feel I should warn these parties that what little I heard or saw from them on the issue of travel lodging, meal and similar expenses fell far short of what they should expect to need to satisfy CRA or this Court should it come to that. In order to substantiate expenses, or to demonstrate the reasonableness of an allowance, it will be helpful if they can produce for CRA records such as logs showing when and where they were and for how long; receipts, cheques or credit card statements for lodging or meal expenses as well as for truck maintenance expenses; supporting evidence that amounts payable to the workers were not fully paid; financial statements, bank records, accounting records and/or tax returns to corroborate what the company and the workers recorded as paid or received; and other similar documents that would help confirm, corroborate, support or prove their version of the events. Mr. Vail did testify he had kept receipts but that he did not bring them to the Court for the hearing. Having heard and seen their evidence on the

issue of travel expenses and the allowances paid to them in this case, I am certain the Appellant would have been disappointed if I had had to decide the second point.

[24] The EI and CPP appeals of the Appellant New Age Transport are allowed. The EI assessment is referred back to the Minister for reconsideration and reassessment on the basis that Mr. Gustafson was not in insurable employment. The CPP assessment is vacated.

Signed at Ottawa, Canada, this 10th day of March 2008.

"Patrick Boyle"

Boyle, J.

CITATION: 2008TCC146

COURT FILE NOS.: 2007-2784(CPP), 2007-2832(EI)

STYLE OF CAUSE: NEW AGE TRANSPORT INC. AND
M.N.R.

PLACE OF HEARING: Saskatoon, Saskatchewan

DATE OF HEARING: February 29, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: March 10, 2008

APPEARANCES:

Agent for the Appellant: Allan Gustafson

Counsel for the Respondent: Brooke Sittler

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